G & C SECURITIES SDN. BHD.

v.

TALASCO HOLDINGS BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 766/1985]
6 JANUARY 1987

CIVIL PROCEDURE: *Application by plaintiff to specifically enforce an agreement for the sale and purchase of land - Whether agreement can be enforced against 1st defendant who is not a party to the agreement - Whether plaintiff entitled to specific performance when agreement provides for forfeiture of earnest money in the event of default.*

This was an application by the plaintiff under O. 81 r. 1(2) of the Rules of the High Court 1980 to specifically enforce a sale and purchase agreement of a piece of land against both the 1st and the 2nd defendants. The 1st defendant originally agreed to pay RM50,000 as earnest money upon the signing of the agreement. The amount of earnest money was subsequently increased to RM90,000. The 1st defendant withdrew its offer to purchase the property as it was not agreeable to the increase and the 2nd defendant stepped in and agreed to purchase the property instead by executing the agreement dated 3 January 1985 with the plaintiff on the same terms originally agreed with the 1st defendant. The 2nd defendant was to settle the balance of the purchase price of RM1.71 million by 17 November 1985 which the 2nd defendant failed to do. Notwithstanding that Clause 5 of the agreement entitled the plaintiff to forfeit the RM90,000 earnest money in the event of default, the plaintiff sought to enforce the agreement against both the defendants on the ground that the 2nd defendant was a nominee of the 1st defendant.

Held:

[1] All the documentary exhibits when taken together do not show that the shareholders of the 1st defendant are the same as the shareholders of the 2nd defendant.

[2] Even if the 1st defendant is a holding company and the 2nd defendant its subsidiary, they are in law separate legal entities and one cannot be held liable for the wrongs of the other.

[3] From the very conduct of the plaintiff entering into the agreement with the 2nd defendant it had manifested its intention to treat whatever arrangements it had with the 1st defendant as coming to an end.

[4] Clause 5 of the agreement which entitles the plaintiffs to forfeit the earnest money paid would, on the face of it, appear to bar the plaintiff's claim for specific performance.

[5] In the light of the triable issues raised, this is not a case to which O. 81 r. 1(2) can apply.

[Application dismissed with costs.]

Cases referred to:

People's Insurance Co. (M) Sdn. Bhd. v. People's Insurance Co. Ltd. & Ors. [1986] 1 MLJ 68
Hong Kong Vegetable Oil Co. Ltd. v. Malin Sirinaga, Wicker & Ors. [1978] 2 MLJ 13

Legislation referred to:

Rules of the High Court 1980, O. 81 r. 1(2)

a *For the plaintiff - Kanesalingam; M/s. Kanesalingam & Co.*
For the defendants - B.K. Sia; M/s. Nazri Aziz & Wong

JUDGMENT

Siti Norma Yaakob J:

b In this application for judgment under O. 81 r. 1(2), the plaintiff seeks to specifically enforce a sale and purchase agreement dated 3 January 1985, against both defendants. The agreement concerns the sale of land held under CT 12315 Lot 9 s. 87A, Bandar Kuala Lumpur, belonging to the plaintiff. Originally the first defendant had, by letter dated 16 November 1984, indicated its willingness to purchase the property at the agreed price of RM1.8 million. However, after the plaintiff had received a sum of RM90,000 by way of earnest money, the first defendant withdrew from the transaction and the second defendant completed the sale instead by *c* executing the sale and purchase agreement dated 3 January 1985 with the plaintiff on the same terms and conditions as offered to the first defendant. The second defendant was to settle the balance of the purchase price of RM1.71 million by 17 November 1985, and when it failed to do so, the plaintiff did not accept that such a breach amounted to a rescission of the agreement but instead seeks to enforce the agreement against both the defendants.

d In the course of arguments before me, the following questions were raised.

1. As the first defendant was not a party to the agreement, can the plaintiff claim specific performance of the agreement against it?

2. As Clause 5 of the agreement provides for the forfeiture of the earnest money and the rescission of the agreement in the event of default by the second defendant, is the *e* plaintiff entitled to specific performance of the agreement against the second defendant?

The plaintiff has not disputed that only the second defendant had signed the agreement but all the same it seeks to enforce the agreement against the first defendant as well on the ground that the second defendant is a nominee of the first defendant. In this respect the plaintiff tried very hard to establish that both the first and second defendants have the same shareholders. For this it relied on the reports of a search made in the Registry of Companies, *f* Exhibits DGG3 and DGG4 and a letter dated 2 April 1985 written by the second defendant's solicitors to the Foreign Investment Committee, Exhibit DGG5, attached to its affidavit in support of the application. Exhibit DGG3 names the 2 shareholders of the first defendant to be Mohd. Nazri bin Abdul Aziz and Megat Junid bin Megat Ayob whilst DGG4 confirms Talasco Properties Sdn. Bhd., TAP Properties Sdn. Bhd. and Ong An Kok to be the shareholders of the second defendant. Against this, the first defendant exhibited two forms *g* 24, HAH1 and HAH2, the first confirming the names of the 2 shareholders of the first defendant as disclosed in DGG3 as at 24 August 1984 and the second showing the names of Anwar Ibrahim and Mohd. Nazri bin Abdul Aziz as the shareholders of the first defendant from 2 May 1985. All these documentary exhibits when taken together do not show that the shareholders of the first defendant are the same as the shareholders of the second defendant.

h Even if the first defendant is a holding company and the second defendant its subsidiary, they are in law separate legal entities (see the case of *People's Insurance Co. (M) Sdn. Bhd. v. People's Insurance Co. Ltd. & Ors.* [1986] 1 MLJ 68) and one cannot be held liable for the wrongs of the other. See the case of *Hong Kong Vegetable Oil Co. Ltd v. Malin Sirinaga Wicker & Ors.* [1978] 2 MLJ 13.

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The plaintiff has also relied on the RM90,000 earnest money being the consideration provided by the first defendant to establish its liability. From the affidavits,it is clear that the first defendant did not make such payments as it had originally agreed to pay only RM50,000 as earnest money. This is borne out by the first defendant's letter dated 16 April 1984 which is exhibited as DGG1 attached to the plaintiff's affidavit dated 14 December 1985 agreeing to pay RM50,000 as earnest money upon the signing of the agreement. Between 16 November 1984 and 3 January 1985, when the agreement was signed, the amount of earnest money had increased to RM90,000 as this was the sum tendered by the second defendant together with its letter dated 26t December 1984 which is exhibited as DGG2 attached to plaintiff's affidavit in support of its application. This increase appears to lend support to the first defendant's contention that it had withdrawn its offer to purchase the property as it was not agreeable to the increase. Proof of this increase is also found in a letter dated 7 December 1984 from the plaintiff's solicitors, Exhibit H1, attached to the first defendant's affidavit dated 18 March 1986, confirming that there had been discussions between the parties as to the amount of the earnest money to be paid and that an agreement had been reached to fix it at RM90,000. It was at this point of time that the second defendant had stepped in and agreed to purchase the property instead on the same terms originally agreed with the first defendant. From the very conduct of the plaintiff entering into the agreement with the second defendant it had manifested its intention to treat whatever arrangements it had with the first defendant originally as coming to an end.

The second defendant also relied on Clause 5 of the agreement which entitles the plaintiff to forfeit the RM90,000 earnest money paid as the only remedy available to the plaintiff pursuant to the second defendant's breach. On the face of it, Clause 5 would appear to be a bar to the plaintiff's claim for specific performance.

In the light of the triable issues raised, I had ruled that this was not a case to which O. 81 r. 1(2) can apply and I accordingly dismissed the plaintiff's application with costs.

Also found at [1987] 1 CLJ 586